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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —, Original

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, COMPLAINANT

v.

STATE OF LOUISIANA, STATE OF FLORIDA, STATE OF TEXAS, STATE OF CALIFORNIA, GEORGE M. HUMPHREY, DOUGLAS MCKAY, ROBERT B. ANDERSON, IVY BAKER PRIEST, DEFENDANTS

OPPOSITION OF DEFENDANTS GEORGE M. HUMPHREY, DOUGLAS McKAY, ROBERT B. ANDERSON, AND IVY BAKER PRIEST TO COMPLAINANT'S MOTION FOR LEAVE TO FILE COMPLAINT

Defendants George M. Humphrey, Douglas McKay, Robert B. Anderson, and Ivy Baker Priest oppose the complainant's motion for leave to file its complaint against said defendants, on the following grounds:

1. The complainant has no standing to sue;

2. The complaint fails to state a claim on which relief can be granted against these defendants;

3. The suit is, in legal effect, one against the United States, which has not consented to be sued; and

4. The United States is an indispensable party.

STATEMENT

The State of Rhode Island, as complainant, seeks to invoke the original jurisdiction of this Court in a proceeding similar to that sought to be instituted against the same defendants in the case of *State of Alabama* v. *State of Texas, et al.*, now before this Court on the complainant's application for leave to file its complaint and the defendants' objections thereto. With certain exceptions noted below, the complaint contains substantially the same allegations as those presented by Alabama and prays for the same relief. See the Statement in our Opposition in the *Alabama* case, pp. 2–3. In summary, Rhode Island claims that the Submerged Lands Act (Public Law 31, 83d Congress, 1st Session, c. 65) is unconstitutional and that the assertions of jurisdiction and control by the defendant States over the land, mineral and natural resources of the subsoil and seabed seaward of the low water mark off their coasts, and the "acquiescence" of the Federal officials in such claims, infringe the rights of Rhode Island as a sovereign state and the rights of its citizens which it seeks to protect as *parens patriae*. It is alleged that the defendant Federal officials intend to turn over to some of the defendant States certain revenues which have accrued from the submerged lands. Complaint is also made of the assertion of jurisdiction by the Gulf States over territory beyond the three mile limit. The complainant seeks a declaration

of unconstitutionality of the Submerged Lands Act and an injunction against the acts complained of.

Rhode Island does not allege, as did Alabama (Alabama's Complaint, paragraphs XII, XV, XVIII, XX, XXIV, XXVII, XXX, and XXXVI), that the defendant States are interfering with the rights of its citizens to fish in the Gulf of Mexico. Instead, Rhode Island alleges, as an additional ground in support of its standing to sue as *parens patriæ*, that its citizens engage extensively in commercial fishing off the coasts of Canada and Newfoundland, where they, in common with other citizens of the United States, have a right to fish outside territorial limits mutually fixed at three miles by treaties of October 20, 1818, and January 23, 1924 (Complaint, Paragraph XVII, page 10); that the assertion by Louisiana, Florida and Texas of territorial jurisdiction of more than three miles in the Gulf of Mexico is a repudiation of the United States' treaty obligation to limit its claim to three miles, which will release Canada from its obligation similarly to limit its territorial waters, and thus will jeopardize the fishing rights of Rhode Island citizens off the Canadian coast (Complaint, Paragraph XXVI, page 16); and that Rhode Island sues as *parens patriae* for its citizens whose livelihood is thus threatened (Complaint, Paragraph XXXII, page 18).

ARGUMENT

The Argument included in our Opposition to Alabama's Motion for Leave to File is equally applicable to the Complaint and Brief in this case. In order to avoid repetition, the Court is respectfully referred to the Argument in that case, pages 5 to 42.

There are two matters raised by Rhode Island which are not directly dealt with in the *Alabama* case: (a) the assertion that citizens of Rhode Island have some basis for complaint because of the alleged effect of the Submerged Lands Act, taken together with the boundary claims of the defendant States, on fishing rights off the coast of Canada (Br. pp. 11–13), and (b) the argument that the submerged lands and resources are not "property" which may be disposed of by Congress under the authority of Article IV, Section 3 of the Constitution (Br. pp. 20–28).

I. THE FISHING RIGHTS OF RHODE ISLAND CITIZENS UNDER CANADIAN TREATIES DO NOT ENTITLE THE STATE TO BRING THIS ACTION IN THEIR BEHALF AS PATRIAE

A. THE FISHING RIGHTS OF RHODE ISLAND CITIZENS OFF CANADIAN SHORES ARE NOT ENDANGERED

At the outset, it is well to point out the insubstantiality of Rhode Island's claim of danger to the fishing rights of its citizens off the Canadian coast. The consequences which Rhode Island predicts (*supra*, p. 3) would not follow even if there were a breach by the United States of a

treaty obligation to limit its territorial waters to three miles. What Rhode Island attempts is to treat unrelated treaties—concerning fishing rights, on the one hand, and the three mile maritime belt, on the other—as *in pari materia*, so that a breach of one by the United States would entitle Canada to abrogate the other.[1]

Article III of the Treaty of Paris, September 3, 1783 (8 Stat. 80, 82), recognized the right of citizens of the United States to fish everywhere off the coasts of British North America. By Article I of the Treaty of October 20, 1818 (8 Stat. 248), the United States relinquished that right within three miles of all bays and of the coast except certain coasts of Labrador and Newfoundland. Neither treaty refers to the limit of territorial waters, contains any undertaking by the United States on that subject, or provides for any fishing rights of British fishermen off the coasts of the United States. It is clear that the operation and continuance of the 1818 treaty are wholly independent of any general agreement between Canada and the United States as to the width of territorial waters. As to most of the Labrador and Newfoundland coasts it permits

[1] It is not to be assumed from this discussion that we agree that the Submerged Lands Act necessarily permits the Gulf Coast States to have a maritime belt wider than three miles. As pointed out in our Opposition in *Alabama's* case (pp. 31-32), the Act purports to permit a three-league boundary in the Gulf of Mexico only if such a boundary is consistent with historic practice and understanding.

fishing all the way up to the shore; on the other hand, the exclusion from "bays" has been held to refer even to bays which are high seas and outside the territorial limits of Canada. I *North Atlantic Coast Fisheries Arbitration* (71 S. Docs., No. 870, 61st Cong., 3d Sess.), Award of the Tribunal, 92–97.

It was more than a century after that treaty of 1818 that the United States and Britain entered into the Treaty of January 23, 1924, mutually recognizing three miles as the limit of territorial waters (43 Stat. 1761). The primary purpose of the latter treaty was to permit the United States to take certain measures against liquor smuggling outside territorial waters; it made no reference to fishing rights and in no way purported to modify or affect the special agreement as to American fishing rights made by the Treaty of 1818. Thus, no breach of the 1924 treaty provision regarding territorial limits would justify Canada in abrogating the wholly separate Treaty of 1818 by which fishing rights were long previously guaranteed, independently of territorial limits. And, in fact, Rhode Island gives no reason for believing that Canada would be sufficiently concerned with the establishment of a three-league boundary in the Gulf of Mexico—if that were a breach of the 1924 treaty—to attempt to abrogate the fishing treaty. Cf. *Alabama* v. *Arizona*, 291 U. S. 286, 291–2; *New York* v. *Illinois*, 274 U. S. 488; *New Jersey* v. *Sargent*, 269 U. S. 328, 337–340; *Connecticut* v. *Massachusetts*, 282 U. S. 660, 669 *ff*.

B. THE STATE CANNOT REPRESENT ITS CITIZENS AS PARENS PATRIAE IN THEIR RELATIONS WITH THE FEDERAL GOVERNMENT

Quite apart from their lack of substantive merit, the allegations of Rhode Island do not entitle it to maintain this suit. In asserting claims of its citizens under a federal treaty and the federal Constitution against federal officials, Rhode Island clearly seeks to represent its citizens "respecting their relations with the Federal Government." But for such representation citizens must look to the Federal Government and not to the States as *parens patriae*. *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486; *Florida* v. *Mellon*, 273 U. S. 12, 18. In this aspect, the case is not like one where a State sues federal officials in its own behalf (e. g., *Missouri* v. *Holland*, 252 U. S. 416) or as *parens patriae* asserts federal rights of its citizens against third persons (e. g., *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439). Here, the State seeks to represent its citizens in asserting federal rights under the Constitution against federal officials; and that, this Court has held, it cannot do.

C. THE FEARED IMPAIRMENT OF RHODE ISLAND CITIZENS' FISHING RIGHTS WOULD BE TOO REMOTE A CONSEQUENCE OF DEFENDANT'S ACTS TO JUSTIFY RELIEF

Even if the fishing rights of Rhode Island citizens were threatened as alleged, and the interests of those citizens were presented here by an appropriate representative, still no ground for relief

would be stated against the individual defendants in this respect because these defendants are neither doing nor threatening to do any act which violates any duty owed to the Rhode Island fishermen or which invades any of their rights. "Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury." *United Gas Co.* v. *Railroad Comm'n*, 278 U. S. 300, 310. And the injury must be a direct one to a legally protected interest of the complaining party. It is not enough to show that the act sought to be enjoined will redound in some way to the disadvantage of the plaintiff; equity will not enjoin it unless it directly invades the plaintiff's legal rights. Thus, a power company was held to have no standing to seek to enjoin the Secretary of the Interior from making allegedly illegal loans to municipalities to enable them to engage in lawful competition with the company. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464. Similarly, a subcontractor who had undertaken to build a gas tank for a prime contractor, on land the owner of which had secured a construction permit, has no standing to seek to enjoin, as an unconstitutional breach of the city's agreement with the landowner, enforcement of a subsequent ordinance zoning the land against such a structure. The

plaintiff had no contract with the city, nor even with the landowner. Such a plaintiff "stands practically in the position of one who seeks to take advantage of the unconstitutionality of a law in which it has only an indirect interest, and by the enforcement of which it has suffered no legal injury." *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 220. Again, where state officials unlawfully refused to receive coupons of state bonds in payment of taxes, a bondholder who was not a taxpayer could not enjoin such conduct even though it destroyed the market value of his bonds. "This damage is not actionable, because it is not a direct and legal consequence of a breach of the contract * * *." *Marye* v. *Parsons*, 114 U. S. 325, 329. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125; *Morrison* v. *Work*, 266 U. S. 481, 490; *Barrows* v. *Jackson*, 346 U. S. 249, 255–256.

So here, the action of these defendants which Rhode Island seeks to enjoin is, at the very most, interference with treaty rights of Canada or Canadians in the Gulf of Mexico. There is no direct infringement by the defendants on the fishing rights of Rhode Islanders. And, obviously, Rhode Island does not stand as *parens patriae* for Canadians; nor is Rhode Island given standing to sue to protect their rights merely by the possibility that interference with them *might* ultimately lead, through possible retaliation by

Canada,' to consequences detrimental to interests of Rhode Island citizens.'

B. THE PERFORMANCE BY THE UNITED STATES OF ITS TREATY OBLIGATIONS IS A POLITICAL MATTER AND NOT JUSTICIABLE

Finally, it should be pointed out that Rhode Island's concern with the continued effectiveness of the fisheries treaty with Canada presents a purely political, and not a justiciable, issue to this Court. The action of the individual defendants which is sought to be enjoined, in this connection, is "acquiescence" in the claims of Florida, Louisiana and Texas to marginal belts greater than three miles (Complaint, Paragraph XXVIII, page 17; Prayer, paragraph 6, page 22). It is not alleged that such "acquiescence" will in itself invade any rights of Rhode Island or its citizens under the Canadian treaties, but only that it will violate a duty owed by the United States to Canada. In other words, Rhode Island simply insists that it can call upon this Court to

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[1] But see *supra*, p. 6.

[2] A somewhat similar situation was presented in *Louisiana v. McAdoo*, 234 U. S. 627, where Louisiana, as a domestic producer of sugar, sought to improve its position with respect to Cuban competition by compelling the Secretary of the Treasury to collect on Cuban sugar a higher tariff than he was doing, as plaintiff alleged to be required by a treaty between the United States and Cuba. The case was decided on the ground that it was a suit against the United States, but this Court clearly indicated its view that the plaintiff had no standing to enforce in that way the treaty provision relied on. 234 U. S. at 631-632. See also *Pearson v. Parson*, 108 Fed. 461 (C. C. E. D. La.), discussed in footnote 5, *infra*, p. 12.

take action to prevent the United States from committing an alleged breach of an international obligation.

But how or whether the United States is to perform its treaties is a matter to be determined by the Executive or the Congress, not by the courts.* "A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do." *Charlton* v. *Kelly*, 229 U. S. 447, 474, quoting V Moore, *Digest of International Law*, 566. "The question whether our government is justified in disregarding its engagements with another nation is not for the determination of the courts." *The Chinese Exclusion* Case, 130 U. S. 581, 602. "It is not for a court to say whether a treaty has been broken or what remedy shall be given; this is a matter of international concern, which the two sovereign states must determine by diplomatic exchanges, or by such other means as enables one state to force upon another the obligations of a

* It is settled that a subsequent statute takes precedence over a prior treaty with which it is in conflict. *The Chinese Exclusion Case*, 130 U. S. 581, 600, *et seq*; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 721, *et seq*; *Clark* v. *Allen*, 331 U. S. 503, 508–509; *Moser* v. *United States*, 341 U. S. 41, 45.

treaty. * * * It is true that this doctrine has been advanced in cases involving conflicts between treaties and statutes; but no reason is apparent why the same considerations should not be applicable when the question is whether an executive officer of one of the contracting states has denied rights secured by treaty to the other." *George E. Warren Corporation* v. *United States*, 94 F. 2d 597, 599 (C. A. 2), certiorari denied, 304 U. S. 572. Cf. *Skiriotes* v. *Florida*, 313 U. S. 69, 74: "* * * none of the treaties which appellant cites are applicable to his case. He is not in a position to invoke the rights of other governments or of the nationals of other countries."[8]

[8] A case similar in many ways to the present one was *Pearson* v. *Pearson*, 108 Fed. 461 (C. C. E. D. La.). There, plaintiffs, a citizen of New York, a citizen of the South African Republic, and the consul general of the Orange Free State, sued the master of a freighter and the owner's agents, all British subjects, to enjoin them from loading 1200 mules owned by the British government, consigned to Cape Colony (a British possession), and destined for use by the British army in the Boer War. Shipping the mules was alleged to violate the provision of the "Alabama Claims" treaty between the United States and Great Britain, that "A neutral government is bound * * * not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms * * *." Treaty of May 8, 1871, 17 Stat. 863, 865. To establish their standing to sue, the plaintiffs alleged that they owned property in the South African Republic and the Orange Free State, which had been and was being destroyed by the war; that shipping the mules would enable Great Britain to prolong the war, thereby subjecting their property to further destruction, whereas if Great Britain were denied

As we have pointed out above (*supra*, pp. 4–6), a breach by the United States of the Treaty of 1924 defining territorial waters, even if such a breach were involved, would not warrant Canada in abrogating the fishing rights specifically guaranteed by the Treaty of 1818 without reference to territorial waters and only partially corresponding to them. Whether Canada would, if it could, take such action is wholly speculative. If it did do so, the resulting disadvantages to Rhode Island citizens would be, as we have noted, only a remote and not a proximate result of the actions

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supplies from American ports the war would end and further destruction of plaintiffs' property would be averted. The court refused a preliminary injunction, on the ground that the case presented was beyond the judicial competence. It first expressed grave doubt, on the merits, whether shipping mules by commercial freighter was an act of the sort forbidden by the treaty provision. Next, it pointed out that the consequences sought to be avoided were remote and not proximate, saying (108 Fed. at 464):

"It is not claimed, of course, that the horses and mules are to be used specially to destroy the property of the complainants. In such cases as the present one, where the aid of equity is invoked to protect property rights, the injury apprehended must be a clear and reasonable one, proximately resulting from the act sought to be enjoined. The injury apprehended by the complainants from the shipping of the mules and horses seems to be remote, indistinct, and entirely speculative. It seems clear that, even if this cause were within the cognizance of this court, there is herein no such connection of cause and effect between the shipment of the animals and the destruction of complainants' property as could sustain an averment of threatened irreparable injury, and that the averment that the war would cease if the shipments are stopped, which, in the nature of things, can only be an expression of opinion and hope concerning a

here complained of. And, in any event, the way in which the United States performs its treaty obligations to other countries is a political and not a justiciable matter. For all these reasons, it is plain that the treaties between the United States and Canada can afford no basis for the cause of action asserted by Rhode Island, and give it no standing to sue.

II. THE SUBMERGED LANDS AND RESOURCES ARE DISPOSABLE BY CONGRESS UNDER THE CONSTITUTION

A. Rhode Island argues at some length (Brief, pages 20–28) that the lands and resources under-

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matter hardly susceptible of proof, could not be made the basis for judicial action."

But the court concluded that it must deny relief for the more fundamental reason that the subject was political and not justiciable. It said (108 Fed. at 464–465):

"* * * the case is a political one, of which a court of equity can take no cognizance, and which, in the very nature of governmental things, must belong to the executive branch of the government. No precedent or authority has been cited to the court which, in its opinion, could even remotely sustain the cause of the complainants. No case has been cited, nor do I believe that any could have been cited, presenting issues similar to those of this cause. The three complainants are private citizens. * * * They claim that, by virtue of a declaration of international law contained in an international treaty to which the foreign countries in which their property is situated were not parties, they have the personal right to enjoin the shipments for the purpose of stopping the war, and thus saving their property from the destruction which they apprehend will result to it from a continuation of the war. When complainants' cause is thus analyzed, and the nature of the alleged right under the treaty is considered, it is obvious that a court of equity cannot take cognizance of the cause."

lying the marginal sea are not "property" and so are not subject to disposition by Congress under Article IV, Section 3 of the Constitution, which provides that Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[1] If that conclusion were indeed valid, it would prove entirely too much, even for Rhode Island. Article IV, Section 3, is the source of congressional power to make regulations regarding the submerged lands or to dispose of their resources;[2] and if those lands and resources are not "property" or "territory" within the meaning of that provision it would follow that the area must remain unregulated and the resources untouched. Presumably, Rhode Island does not deny the power of Congress to extract and dispose of the minerals; one of its principal purposes in this proceeding is to protect its asserted right to share in past and future proceeds of such disposal. Moreover, if Congress had no power to make rules and regulations for the area, it could not provide for extraction of minerals even for the Government's

[1] The State does not explicitly say whether or not it regards the submerged lands as "territory" of the United States within the meaning of Article IV, Section 3, but the clear purport of the argument is that these lands are neither "territory" nor "property."

[2] It should be particularly noted that the clause gives Congress not only the power to dispose of federal property but also to "make all needful Rules and Regulations respecting" such property.

own use. But if these lands are property for which Congress can make rules and regulations, and if the minerals can be sold, then by the same token these lands and resources are necessarily property of which Congress can dispose under Article IV, Section 3.*

B. Rhode Island's contention is, in essence, that the submerged lands and resources are attributes of the powers of the Federal Government over foreign affairs and national defense, and consequently are as inalienable as those powers. The lands and resources came in the first instance to the Federal Government because it possessed those powers, but it does not follow that for that reason they are clothed with inalienability. The obvious analogy is the power of the States to dispose of their submerged lands underlying inland navigable waters. Under the rule of *Pollard's Lessee* v. *Hagan*, 3 How. 212, those lands belong to the State "as an inseparable attribute of state sovereignty" and "as an incident of state sovereignty". *United States* v. *California*, 332 U. S. 19, 30, 36. See also *Barney* v. *Keokuk*, 94 U. S. 324, 338; *Donnelly* v. *United States*, 228 U. S. 243, 261–262 (these lands belong to the

* Rhode Island admits that history has rejected Gouverneur Morris's thesis that new States could not be created out of territory acquired after the adoption of the Constitution, but it nevertheless bases its view of Article IV, Section 3, on that unacceptable premise (Brief, pp. 25–26).

States "by their inherent sovereignty").[9] But though state "dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged" in construing grants (*United States* v. *Oregon*, 295 U. S. 1, 14; *United States* v. *Texas*, 339 U. S. 707, 717), it is settled that by express legislation the States may convey their title as they see fit to private individuals or to municipalities (subject only to the paramount powers of the Federal Government).[10] Since the offshore lands are an incident of federal or external sovereignty in the same sense as the submerged lands beneath inland navigable waters are an attribute of state sovereignty (see *United States* v. *California*, 332 U. S. 19, 36;

[9] For that reason, title to such land automatically passes, without specific mention, from the United States to a new State on its admission, where the United States formerly held the title when the State was a territory. *United States* v. *Texas*, 339 U. S. 707, 716–717; *United States* v. *Oregon*, 295 U. S. 1, 14; *United States* v. *Utah*, 283 U. S. 64, 75; *Scott* v. *Lattig*, 227 U. S. 229, 242–243; *Oklahoma* v. *Texas*, 258 U. S. 574, 583; *United States* v. *Holt Bank*, 270 U. S. 49, 55.

[10] *Weber* v. *Harbor Commissioners*, 18 Wall. 57, 66; *Donnelly* v. *United States*, 228 U. S. 243, 262; *Port of Seattle* v. *Oregon & W. R. R.*, 255 U. S. 56, 63; *United States* v. *Holt Bank*, 270 U. S. 49, 55; *Appleby* v. *City of New York*, 271 U. S. 364, 381, 388–389; *United States* v. *Dern*, 289 U. S. 352, 354; *United States* v. *Willow River Co.*, 324 U. S. 499, 503; see *United States* v. *Texas*, 339 U. S. 707, 716–717; *cf. Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479, 487.

United States v. *Texas*, 339 U. S. 707, 716, 720), the same rules as to disposition must apply."

There are other well-known illustrations of the power to dispose of property which is acquired as an incident or attribute of inalienable federal powers. The District of Columbia became federal territory in order to provide "the Seat of the Government of the United States" (see Art. I, Sec. 8, Clause 17, of the Constitution), but in 1846 a portion was receded to Virginia. The Philippines became a United States possession as a result of the exercise of federal powers over foreign relations and the national defense, but no one doubts the validity of the grant of independence to the Islands. Forts, army posts, arsenals, and other military installations—all acquired for the purposes of national defense—

[11] Because the disposition here is by the United States to the States, it is of interest to note that there have been a great many grants by States of land under navigable inland waters to the United States. For a partial list of such grants in areas near the coast, see the Brief for the United States, *United States* v. *California*, No. 12, Orig., Oct. Term, 1946, pp. 166 *ff.*, and Appendix B, pp. 227 *ff.*

Alabama seems to suggest in its Reply Brief (p. 5, fn. 10) that the *Pollard* case holds that a state cannot cede submerged lands beneath inland waters to the United States. We do not read the *Pollard* case as so stating, but if it does that portion of the opinion has been overruled by the later decisions holding that the State can make grants of these lands. See the cases cited in fn. 10, *supra*. See also *Shively* v. *Bowlby*, 152 U. S. 1, 28, 47–49, 58, and the other cases holding that the United States can dispose of these lands while the area is still a territory.

have been turned over to States and municipalities when it has been determined that this can safely be done. Munitions of war have frequently been handed over to foreign countries, see, e. g., 39 Op. Atty. Gen. 484, 489 *ff* (over-age destroyers). And the Federal Government may dispose of hydroelectric energy, produced as a byproduct of Congressional control over navigation and commerce, *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 330–336."

C. Rhode Island also asserts (Br., p. 26) that "this Court has repeatedly held, those resources do not constitute 'property' of either the United States or the adjoining states." No citation is given in support of that statement, but it presumably alludes to the fact that this Court used the term "paramount rights" rather than "ownership" in its decrees in *United States* v. *California*, 332 U. S. 804, 805, *United States* v. *Louisiana*, 340 U. S. 899, and *United States* v. *Texas*, 340 U. S. 900. But in holding that the United States "has

[12] Rhode Island's survey of early history (Brief, pp. 6–7, 23–26, 53–64) relates entirely to (a) views of federal power over property which have since been authoritatively rejected, or (b) feared disposal of property or rights to *foreign* governments (rather than from the Federal Government to the States), or (c) prophecies and assurances that, as a matter of probabilities, certain feared action *could* not be taken by the new government (not that it *could* not be taken, as a matter of law); or (d) problems wholly remote from those involved here, e. g., claims by the then existing states to actual legal interests of property in the western lands.

paramount rights in and power over that belt, an incident to which is full dominion over the resources of the soil under that water area, including oil" (*United States* v. *California*, 332 U. S. 19, 38–39), the Court did not hold that there were no property rights in the area, or that the United States did not own such rights. On the contrary, the greater includes the less, and the "paramount rights in, and full dominion and power over, the lands, minerals and other things", which this Court held to belong to the United States (*United States* v. *California*, 332 U. S. 804, 805), necessarily included rights of every description, proprietary as well as governmental. That is implicit in the statement in the *California* case that "The crucial question on the merits is not *merely* who owns the bare legal title to the lands under the marginal sea. The United States here asserts rights in two capacities transcending those of a mere property owner" (332 U. S. at 29; emphasis added). The Court clearly recognized that the right to dispose at least of the minerals was in issue when it said, "* * * our question is whether the state or the Federal Government has the paramount right and power to determine *in the first instance* when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited" (*ibid.*, emphasis added). The phrase, "in the first instance",

shows that the Court had in mind the possibility of transfer of the rights and powers referred to; and certainly exploitation of the resources, contemplated by the Court, would include disposal of them. Cf. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 336:—"And it would hardly be contended that, when the Government reserves coal on its lands, it can mine the coal and dispose of it only for the purpose of heating public buildings or for other governmental operations. * * * Or that when the Government extracts the oil it has reserved, it has no constitutional power to sell it. * * * The United States owns the coal, or the silver, or the lead, or the oil, it obtains from its lands, and it lies in the discretion of the Congress, acting in the public interest, to determine of how much of the property it shall dispose."

That this Court, in using the term "paramount rights", had no thought of precluding the existence of property rights within its scope, appears from its statement, "If this rationale of the *Pollard* case is a valid basis for a conclusion that *paramount rights* run to the states in inland waters to the shoreward of the low water mark, the same rationale leads to the conclusion that national interests, responsibilities, and therefore national rights are *paramount* in waters lying to the seaward in the three-mile belt" (332 U. S. at 36; emphasis added). The term was thus shown

to be used in a sense equally applicable to state rights in inland waters and federal rights in the marginal sea, and the Court regarded the two rights as comparable. As shown above (*supra*, pp. 16–18), it is well settled that the rights of a State in lands under navigable inland waters include alienable property rights.

It is unnecessary, however, to rely on inference or deduction to determine whether the federal rights in submerged lands and resources were regarded by this Court as "property", within the meaning of Article IV, Section 3, for the Court expressly declared that they were such property. In *United States* v. *California*, the jurisdiction of the Court was challenged on the ground that only a political question was involved. In overruling that contention, the Court said, "The justiciability of this controversy rests therefore on conflicting claims of alleged invasions of interests in *property* and on conflicting claims of governmental powers to authorize its use" (332 U. S. 19, 25; emphasis added). Since the jurisdiction of the Court to decide the case was predicated on the fact that property rights were the subject in dispute, it is too late now to reopen the same question by contending that the rights there adjudicated were something other than property rights. Moreover, as pointed out, in our Opposition in the *Alabama* case (pp. 24–25), the Court clearly indicated, in discussing the

power of Congress to prohibit the Attorney General from bringing the *California* suit, that the submerged offshore lands fell under Art. IV, Sec. 3, and in that connection referred to them as "public property". See 332 U. S. at 27–28. And at the close of its *California* opinion, the Court declared that it would not assume that "Congress, which has constitutional control over Government *property*, will execute its powers in such way as to bring about injustices to states, their subdivisions, or persons acting pursuant to their permission." 332 U. S. at 40 (emphasis added)."

CONCLUSION

For the foregoing reasons, and for the reasons set forth in these defendants' Opposition to the Motion of the State of Alabama for leave to file its complaint against the State of Texas, et al., it is submitted that Rhode Island has no standing to sue; that the complaint fails to state a claim on which relief could be granted against these defendants; that the suit is against the United States, which has not consented to be sued; that

[11] Rhode Island relies (Br., pp. 22–23) on former Congressman Hobbs's view that the offshore submerged lands "are the common property of the family of nations," but that position is at war with the basic rationale of the *California*, *Louisiana*, and *Texas* decisions, and has not gained any substantial acceptance. So far as the United States is concerned, the opposite position has been explicitly taken by the Continental Shelf Proclamation (Proclamation No. 2667 of Sept. 28, 1945, 59 Stat. 884) and Section 3 of the Outer Continental Shelf Lands Act, 67 Stat. 462 (Act of Aug. 7, 1953).

the United States is an indispensable party and is not, and cannot be, joined. For each and all of these reasons leave to file the complaint should be denied.

Respectfully submitted,

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